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Supreme Court of the United States

October Term, 1965

No. 998

CRISSIE KISER, JAMES C. KISER, JOHN HENRY EPLING, EDNA EPLING, DWIGHT FLYNT, AND LOCKIE FLYNT,

Petitioners,

v.

BREAKS INTERSTATE PARK COMMISSION,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioners, Crissie Kiser, James C. Kiser, John Henry Epling, Edna Epling, Dwight Flynt, and Lockie Flynt (hereinafter referred to as Petitioners), and each of them, pray that a writ of certiorari issue to the Supreme Court of Appeals of the Commonwealth of Virginia, to review a final judgment rendered by said Supreme Court of Appeals on the 24th day of November 1965 whereby it refused an appeal applied for by the petitioners to said court to review a final decree entered by the Circuit Court of Dickenson County in said Commonwealth on the 23rd

day of June 1965. A transcript of the record in said cause, including the proceedings and all matters therein in the Supreme Court of Appeals of Virginia and also in said Circuit court, is herewith furnished certified by the clerks of the appropriate courts as provided by Rule 21 of your Honors' Court.

OPINION BELOW

No opinion was rendered by either the Circuit Court of Dickenson County or the Supreme Court of Appeals of Virginia, except as contained in their respective decrees; so much of which as is pertinent is printed hereto Appendices A and B.

JURISDICTION

The decree of the Supreme Court of Appeals, the highest court of the Commonwealth in which a decision could be had refusing the appeal, was entered November 24, 1965 and was final. Va. Code 1950, Sec. 8-476.

The jurisdiction of this court is invoked under Title 28, Sec. 1257 (3), 2101 (d) U.S.C.

QUESTIONS PRESENTED

1.

Does a decree of a State Court confirming the report of Commissioners appointed to evaluate land taken in an eminent domain proceeding, which report is clearly against the prepondering weight of the evidence after a view taken by them, and after then being instructed by the court *that they were not bound by the weight of the evidence but should take into consideration what they saw upon their view to determine the market value of the land taken and fix the compensation therefor,* deprive the owners of their property without due process of law or deny them of the

equal protection of the law? Stating the proposition more tersely under the Fourteenth Amendment, can a state deny a land owner the benefit of his evidence of its value by instructing the Commissioners appointed in an eminent domain proceeding to fix the value of the land to be taken after a view and hearing evidence that they can disregard the evidence and fix the value upon their view of the property when the evidence the court admitted showed the land to be taken to be much more valuable than the Commissioners found? Is the opinion of Commissioners formed upon a view to be accepted rather than the testimony produced by the landowners?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> "No State * * * shall deprive, any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws."

STATEMENT OF THE CASE

I. Procedural History of the Case

Pursuant to authority granted by the Congress of the United States on August 14, 1954 (67 Stat. 584, Public Law 275) as later amended by Act approved September 18, 1964 (78 Stat. 257), . . . the Commonwealths of Kentucky and Virginia by the authority of their several legislative bodies entered into a compact or agreement which was to be an instrumentality of both Commonwealths in which all acts thereunder were to be deemed governmental functions, to create a corporate body known as Breaks Interstate Park Commission, of such area and character as might be deter-

mined by the Commission. This park was to be located in Pike County, Kentucky and Buchanan and Dickenson Counties, Virginia, where Russell Fork of Big Sandy River flows from Virginia into Kentucky. By like authority this was carried into effect (Acts. Va. Assembly 1954, p. 36), and was amended so as to give said Corporation the power of eminent domain (Public L. 88-602), H.R. 11162 of Sept. 18, 1964) (Acts Va. 1964, Ch. 291) Michies Supp. Va. Code of 1950, edition Sec. 25-232.

Petitioners owned in fee the surface of three adjoining tracts of land which Breaks Interstate Park Commission desired, and acting under this authority, the Park Commission instituted a suit in the manner provided by law in the Circuit Court of Dickenson County, Virginia, the court of proper jurisdiction, to condemn these three tracts of land. Petitioners appeared and filed proper defenses, and on a hearing the court appointed Commissioners, who were sworn and viewed the lands, heard evidence; and at the conclusion of said evidence, the court gave the Commissioners eight instructions, among which was "Instruction No. F" as follows:

> "The court instructs the Commissioners that while the parties to this proceeding have the right to present evidence, oral or otherwise, and you should consider all the evidence, you are not bound by the opinion of experts or by the apparent weight of the evidence, but, taking into consideration what you saw upon your view of the land, you may determine the present market value of the land and fix compensation in the manner set forth in the other instructions of the Court."

Whereupon the Commissioners retired to a room (the accustomed jury room) and some time thereafter returned to the court room with a previously prepared report, except

the amount containing conclusionary findings as follows: Kiser Tract $2,700.00; Epling tract $2,260.00; and Flynt tract $1,375.00 (See Appendix C).

In accordance with the state practice, these defendants filed exceptions to this report which contained the following:

> "The court erred in the instructions given, especially: * * * Instruction 'F', which allowed the Commissioners to make the law governing their proceeding and the award to be made by themselves, and roam around as to what the law governing them was, as to the qualifications of an expert witness, the weight to be given opinion evidence, the best evidence of value, examples of such by way of illustration, and especially in allowing the commissioners to disregard the evidence which the court admitted, and to find an award from their own whims and preconceived opinions of what might be right, and to make a tribunal of themselves and an award thereon and thereby not founded on the evidence.
>
> "This instruction allows the taking of defendants' property without the due process of law guaranteed them by the Fourteenth Amendment of the Constitution of the United States, in that it allowed this property to be taken at the mere uncontrolled whim of the commissioners, is without any rule or directive as to how they were to arrive at their conclusion or complying with any standards. It allowed them to make an award without conforming with any testimony or contrary to all testimony.
>
> "Further, this instruction allowed a conclusionary finding without stating any reason or fact upon which it was reached."

Upon a hearing on these exceptions, without any further evidence, the court overruled them and confirmed the report in all particulars and "doth hereby confirm unto the Breaks

Interstate Park Commission the entire interest of the above defendants to the surface of the following property" (description is not copied because immaterial) (See Appendix A of this Petition). Thereupon, the petitioners, in the time and manner prescribed by the law of the Commonwealth of Virginia, gave notice of an appeal from said decree to the Supreme Court of Appeals of Virginia with assignments of error, among which were:

> "4. The Court erred in the instructions given, especially:
>
> "Instruction 'F' which allowed the Commissioners to make the law governing them and their proceedings and the award to be made by themselves, and roam around and speculate as to what the law governing them was; especially what qualified a person as an expert witness, the weight to be given opinion evidence, the best evidence of values and examples of such by way of illustration; and especially in allowing the Commissioners to arbitrarily disregard evidence that the Court admitted, and make an award from their own whims and preconceived opinions of what might be right or advantageous to the public, and thus to make a tribunal of themselves and without any standard or rule to guide them make an award therein not founded on evidence.
>
> "5. The said Circuit Court erred in giving instruction 'F'; because it allows these defendants' property to be taken without the due process of law, and of the equal protection of the law guaranteed them by the Fourteenth Amendment of the Constitution of the United States, in that it allowed their property to be taken at the uncontrolled whim of the Commissioners, and without any rule or direction as to how they were to arrive at their conclusion or complying with any standards. It allowed them to make an award without conforming with any testimony or contrary to all testimony.

"6. Said Circuit Court erred in giving this instruction 'F' because it allowed a conclusionary finding without stating any reason or fact upon which it is based and thus deprives these defendants of their property without either the due process of law, or the equal protection of the law guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

"7. The said Circuit Court erred in the manner it submitted the case to the Commissioners in that it allowed them to conclude an award which would be and was insufficient to constitute the due process of law required to take the defendants' vested property, guaranteed by the Constitution of the United States, especially the Fourteenth Amendment thereto; because it allows a conclusionary finding by the Commissioners who were allowed to make a law according to their own whims or notion without the supervision of the Court, or without indicating what facts it found, if any, upon which to base its award, or what path they took or standard they adopted to reach it."

All of these were urged in the argument to the said Court, but the Court refused the appeal (Appendix B to this petition).

II. Facts Material to Case

The Principal facts material are set forth under the preceding head. In the evidence the complainant introduced four witnesses, who testified that the property to be taken was the entirety of three separate tracts owned by Kiser, Epling and Flynt, respectively, bounded on the north by State Highway 80 about 2,300 feet, and that the Flynt tract was also bounded on the east by State Highway No. 609 for 550 feet, and that both highways were constructed with hard top, with asphalt binder and were heavily traveled. None of the Commission's witnesses was from the vicinity

and they went upon the lands only once. One said he took only a general view and noticed only a few trees, and the others gave their opinion of the value of the lands as a whole from $60.00, $105.00, and $100.00 to $125.00 per acre, as timberland and farm land. On the contrary, petitioners introduced nine witnesses who were either reared in the vicinity of the land, owned and sold real estate close by and were familiar with the prices for which property had been bought and sold, or had been in the vicinity trying to purchase land or lots for building purposes and they testified that the lands taken were adapted to such use. These witnesses valued the lands at from $900.00 to $1,600.00 per acre, with the timber valued at from $300.00 per acre to $4,000.00 for the whole. Six of these witnesses who had spent their lives in the vicinity testified that they had sold and paid such prices there for similar lands and that the demand was great. By actual estimate according to the Government's standards of estimating timber, there was over 100,000 feet of timber that could be cut into lumber with a good undergrowth.

Stages and Manner In Which Federal Question Was Raised

The federal question was first raised in the court of first instance by exceptions to the report of the commissioners, as copied above, before it was confirmed; and that court being without authority to hear any further evidence overruled the exceptions, *Gas Corp.* v. *Horner*, 200 Va. 824. It was raised in the Appellate Court in petitioners' notice of appeal as set out above and again in the petition and argument to that court, which subsequently refused the appeal as shown by Appendix B attached to this petition.

ARGUMENT

Reasons for Granting the Writ

The federal question was raised in ample time and in a proper way. *Chicago B & Q Ry.* v. *Chicago,* 166 U.S. 226, 41 L. Ed. 979. Hence, this court has jurisdiction.

Instruction F, copied above, given to the Commissioners just before they retired to consult upon their award is not just an isolated mistake but is the result of a settled course of decisions applied to all property owners in all eminent domain cases in the State courts of this Commonwealth. It presents a federal question of substance not heretofore, so far as we can find, applied in a way which does not accord with the decisions of your Honors' court. *U. S. Metz,* 376 U. S. 192, 11 L. Ed. (2d) 629. If followed, it makes the method of evaluating property by commissioners in eminent domain proceedings depend upon whether the proceedings are in a State or Federal Court, and gives a State the right to allow a procedure different from that applied by a federal court in condemning the same property, and thus denies a property owner of the equal protection of the law. If followed, it applies State procedure in a case in which Federal authority is paramount as this proceeding is by virtue of authority authorized by Congress, consenting to the compact between these two Commonwealths.

At the beginning of this century in an eminent domain case, the Virginia Supreme Court said:

> "The best that can be done is to appoint capable and upright commissioners to go upon the land, examine it, hear the testimony, and consider all the facts and circumstances surrounding the situation, and likely to enter into the value of the subject." *Richmond & C. Ry.* v. *Chamblin,* 100 Va. 401.

This view has been gradually expanded in this state until the court has, as in this case, established a rule that Commissioners may base their report on *their* view, whatever the evidence. We contend this deprives the owner of his property without due process of law and denies him the equal protection of the law; for in all other kinds of proceeding, the owner of the property is allowed to be confronted with the witness against him and introduce under the direction of the court the kind of evidence he can produce. The reason given by the Virginia court for this departure is that the commissioners:

> "May base their findings on facts obtained by their view of the property which does not appear in the record." *May* v. *Malcom,* 202 Va. 78, 82.
>
> "Commissioners * * * could give their own conclusions based upon their view of the land." *V.E.C. Co.* v. *Pickett,* 197 Va. 269, 276.

This puts every man's property in the Commonwealth at the whim, caprice, passion or prejudice of commissioners untrained in the procedure to be followed, without the direction of the court, to make such rules and consider anything their fancy might suggest, if the legislature will confer the power of eminent domain upon any person that desires the property.

> "If the defendant in a federal court were to be denied the opportunity to be confronted with the witnesses against him the denial of the privilege would not be overlooked." *Snyder* v. *Mass.,* 291 U.S. 97, 78 L. Ed. 674.
>
> "A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable." *Id.*

Errors Here Urged

Did the decree of the court in confirming the report made in conformity to instruction F given to the commissioners just before retiring to a room out of sight and hearing of all as follows:

> "You are not bound by the opinion of experts or by the apparent weight of the evidence but, taking into consideration what you saw upon your view of the land, you may determine the present market value of the land and fix compensation."

deprive petitioners of their property without due process of law, or deny them the equal protection of the law?

It has often been said by the Virginia courts with reference to a view *by a jury* it was to enable it to apply the testimony disclosed upon the trial, "but does not authorize them to base their verdict on such view, nor become silent witnesses to facts which were not testified to in court," *Kimball* v. *Friend,* 95 Va. 125.

> "A view is not intended to supply evidence, but only to explain or clarify it." *Noell* v. *Com.,* 130 Va. 600.

Similar rules should apply in proceedings to condemn property under the power of eminent domain as applied in other cases. In eminent domain proceedings, commissioners are substituted for a jury, and as a commission deals with corporeal things, a view is required. But whatever procedure is followed, equal protection of law demands that equal treatment must be given to all persons, with reference to security of their property. The Virginia Bill of Rights declares that all men are equal and have the inherent right to possess property, Va. Court, Art. 1, Sec. 1; and that in controversies

respecting property, trial by jury is preferable to any other and ought to be held sacred. *Id.* Sec. 11. At the time that was penned, the practice in condemnation proceedings was to call the triers of fact commissioners, and it has always been understood that they are equivalent to jury. The Fourteenth Amendment requires that their functions must be equivalent, and their powers and authority be the same. In *Snyder* v. *Mass., supra*, Mr. Justice Cardozo said:

> "A view is not a trial nor any part of a trial in the sense in which a trial was understood at common law."

We insist:

> "Procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." *Willner* v. *Common Character & Fitness,* 373 U.S. 96, 10 L. Ed (2d) 224.
>
> "The proceeding is judicial in its character, and the party in interest is entitled to have an impartial tribunal and the usual rights and prvileges which attends investigation." Cooley's Const. Lim. (7th) 817. *Monongahela Nav. Co.* v. *U.S.,* 148 U.S. 312, 37 L. Ed. 463.
>
> "When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditonally been associated with judicial process." *Hannah* v. *Larche,* 363 U.S. 420, 4 L. Ed. (2d) 1307.
>
> ". . . that it shall be conducted in some fair and just manner with the opportunity to the owner to present evidence as to its value, and to be heard thereon." *U.S.* v. *Jones,* 109 U.S. 513, 27 L. Ed. 1015.

"The determination is to be made in the light of all the facts affecting the market value that are shown by the evidence." *Olsen* v. *U.S.*, 292 U.S. 246, 78 L. Ed. 1236.

"A full hearing is one in which ample opportunity is afforded to all parties to make by evidence or argument a showing fairly adequate to establish the propriety, or impropriety from the standpoint of justice and law, of the step asked to be taken." *Akron C & Y Ry.* v. *U.S.*, 261 U.S. 184, 67 L. Ed. 602

"It was for the jury [commissioners in this case] to determine the facts, but it belonged to the Court to determine the legal principles by which they were to be governed in fixing the amount of compensation." *Chicago B & Q Ry* v. *Chicago*, 166 U.S. 226, 41 L. Ed. 976.

"A denial of a constitutional right demands judicial protection." *Reynolds* v. *Sims*, 377 U.S. 533, 12 L. Ed. (2d) 527.

"A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard is not a judicial determination of his right, and is not entitled to respect in any other tribunal * * *. It is in fact a mere arbitrary edict clothed in the form of a judicial sentence * * *. Notice is only for the purpose of affording the party an opportunity to be heard * * *. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether." *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 916.

In *Hovey* v. *Elliott*, 167 U.S. 409, 42 L. Ed. 215, the court struck out the defendant's answer and rendered judgment, and it was held the judgment was void. *Galpin* v. *Page*, 18 Wall. 350, 21 L. Ed. 959.

This Instruction Was An Attempt To Delegate Judicial Power

By this instruction the court attempted to delegate its power. This it cannot do.

> "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison,* 1 Cranch, 137, 177, 2 L. Ed. 63, 73.

What evidence the commissioners were to receive and consider, what law they should apply and how they should arrive at the amount to be awarded were questions of law for the court which could not be delegated to any person or body. Courts have only the authority delegated by the law making power, and this authority it cannot delegate to any one else, much less to the body whose conduct they are by law created to direct. *Delegatus non potest delegare,* 2 Kents Comm. 633; *Warner* v. *Martin,* 11 How 209, 223, 13 L. Ed. 667, 672.

These petitioners had the right to have this special untrained tribunal which was to fix the value of their property being taken without their consent and against their will guided and supervised in their proceedings by rules provided by law.

> "A judge cannot delegate his authority to another." 3 Kents Com. 457.
>
> "Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the Constitution as one that would give the courts executive or legislative power." *Brown* v. *Buck,* 75 Mich. 274, 13 A.S.R. 438.
>
> "Those who are chosen by the people to sit as judges must themselves discharge all the judicial duties of their office. * * * The trust is a personal one, inalienably

invested in the person selected by the people and cannot be delegated." *State* v. *Noble,* 118 Ind. 350, 10 A.S.R. 143.

Even the legislature cannot confer upon a body, municipal or otherwise, power to affect one in his private rights without providing it with directions for the manner of procedure that will give the party to be affected notice and an opportunity to avoid injury or to protect his rights.

This instruction here under consideration allowed the commissioners to declare the legal principles by which they would be governed or whether they would follow any rule or principle; to declare by let or leave what law they should follow; what they should consider; what evidence was admissible; to disregard the evidence the court admitted however convincing; what qualified a person to give his opinion of values; find an award from their own whims or preconceived opinion as to the value of this recreation area and who should pay for it; and to thus constitute a tribunal of themselves and make an award not founded on any evidence and contrary to and against the undisputed evidence; and all this without any rule or direction as a guide of what they should do or how to do it. It gave the Commissioners a roving power to inquire into fields they should be forbidden to enter. This instruction allowed them to make a conclusionary award without stating upon what it was based, what suggested it, what road it followed to reach it, or whether it would give the equal treatment it allowed others standing in the same situation, and thus deprived the petitioners of their rights contrary to the Fourteenth Amendment. *U. S.* v. *Metz, supra.* The instruction allowed these commissioners to do all this, although the law requires that all persons have their rights to their property tried according to the evidence adduced.

"The concept of equal protection has traditionally been viewed as requiring the equal treatment of persons standing in the same relation." *Reynolds* v. *Sims,* 377 U.S. 533, 12 L. Ed. (2d) 529.

"Where otherwise valid legislation is sought to be applied in an unconstitutional manner we do not sustain its application." *Gibson* v. *Fla., Leg. Investigating Com.,* 372 U.S. 539, 9 L. Ed. (2d) 947.

"Though the court may possess jurisdiction of a cause, of the subject matter and the parties, it is still limited as to modes of procedure." *Windsor* v. *McVeigh, supra; Yick Mo* v. *Hopkins,* 118 U.S. 356, 30 L. Ed. 220.

"If the Legislature leaves to administrative officers the determination of what the law shall be, or to determine what acts are necessary to effectuate the law, such delegation of authority is void." *People* v. *Belcastro,* 356 Ill. 144, 190 N.E. (2d) 301, 92 ALR 1223.

"It is a fundamental of our system of government that the rights of men are to be determined by the law itself, and not by let or leave of administrative officers or bureaus. It is the prerogative of the legislative branch of the government to determine and declare what the law shall be, and the legislative branch may not delegate this function to executive or administrative officers." *Thompson* v. *Smith,* 155 Va. 367.

"The legislature must declare the policy of the law and fix the legal principles which are to control in a given case." *Id.*

"A party in any case has a right to demand that the judgment of the court be given upon his suit, and he cannot be bound by a delegated exercise of judicial power, whether the delegation be by the courts or by legislative act devolving judicial duties on ministerial officers." Cooley's Const. Lim. (7th) 589.

This is a case in which the court followed the usual procedure until the commissioners were ready to retire and consider the award they were to make. Then the court in effect told them they did not have to give any consideration to the evidence it had permitted the parties to introduce but could fix the compensation the owners should receive on what they saw, whether they saw all the probabilities to which the property was adapted or not, and thus take petitioners' property and transfer it to another without giving them the benefit of a hearing, and thus denied them the protection all other land owners are accorded. The procedure to take an owner's property must be uniform, consistent and non-discriminatory. *Cox* v. *La.*, 378 U.S. 329, 12 L. Ed. (2d) 587. This was a perfect device for allowing petitioners' property to be taken without due process and compelled them to donate what the public should pay for. It allowed their property to be taken not as the law accorded other property owners but according to the uncontrolled will of a set of commissioners to confer it to the public if they believed it was not worth much as a good recreation area or play ground. The Fourteenth Amendment was designed "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *U.S.*, 364 U.S. 40, 4 L. Ed. (2d) 1561. The law is a rule. Who can say that one set of commissioners, not governed by any rules, will apply the same standards that another has or will? Uniformity is required by the Fourteenth Amendment. It prevents officials from denying at whim, fancy or favor the same treatment accorded one person that is accorded another. It is the scale by which all men's property, from the humblest to the most exhalted, is weighed, the plumb by which all men's rights are adjusted. It is the level down to which the highest and haughty are brought, up to where the humblest

and meekest are raised. It knows no rank or station or prerogative. It coerces the state from denying the poorest, most forgotten and forlorn what it grants the grandest and most powerful. This Amendment means that no agency of the state-legislative, executive or judicial—no instrumentality of the state, and no person, officer or agent exerting the power of the state shall deny to any person the protection it affords another, and applies to every act that is enforced or administered by the state.

But if it is contended that this instruction given is only permissive and not directory, we reply in the language of our Supreme Court:

> "An instruction permitting an erroneous finding may be not less hurtful than one that requires it." *Wash* v. *Holland,* 166 Va. 45, 56.

Due process requires that the value of petitioners' property be determined on evidence. *Fay* v. *Noia,* 372 U.S. 391, 9 L. Ed. (2d) 837, 862.

> "Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene* v. *McElroy,* 360 U.S. 474, 496, 3 L. Ed. (2d) 1377.

CONCLUSION

For the reasons above set forth, petitioners, and each of them, pray that a writ of certiorari be granted by your Honors directed to the Supreme Court of Appeals of Virginia, as provided by the rules of your Honors' court to certify the record and proceeding in the cause of Breaks Interstate Park Commission against the petitioners as above

set forth, and that on a hearing on said writ the decrees of said Supreme Court of Appeals and the Circuit Court of Dickenson County be reversed and annulled. And your petitioners will ever pray, etc.

Respectfully submitted,

S. H. SUTHERLAND
Clintwood, Virginia
Counsel for Petitioners

APPENDIX

APPENDIX A

Final Order Confirming Commissioner's Report

This cause came on this day to be heard upon the report of the Commissioners duly filed on March 24, 1965; upon the defendants' exceptions thereto filed on April 3, 1965; upon all former proceedings had herein; and upon argument of counsel.

It appearing to the Court that the defendants' exceptions to the report of the Commissioners are not well taken, and that each and all of them should be overruled, the Court doth overrule said exceptions to said report, and it is ORDERED that said report be, and it hereby is, confirmed in all particulars. To this action of the Court the defendants, by counsel, duly excepted.

It appearing that the defendants, by their Answer and the Deeds filed as Exhibits, do not claim the ownership of the coal and the right to remove the same, and that the Breaks Interstate Park Commission is not condemning the coal, gas, oil, or other minerals, and the right to remove the same, but is only condemning the surface of the lands of the defendants; and it further appearing that the Commissioners ascertained the value of the surface of the land taken from Chrissie Kiser and James C. Kiser, her husband, at $2,700.00; and the value of the surface of the land taken from John Henry Eppling, his wife, at $2,260.00; and the value of the surface of the land taken from Dwight Flynt and Lockie Flynt, his wife, at $1,375.00; and that there was no damages to the residue of any of the above defendants, the Court doth hereby confirm unto the Breaks Interstate Park Commission the entire interest of the above defendants to the surface of the following property:

* * *

It is further ORDERED that the Breaks Interstate Park Commission pay to the Clerk of this Court $2,700.00 for the surface of the property owned by Crissie Kiser and James C. Kiser, her husband, and $2,260.00 for the surface of the property owned by John Henry Eppling and Edna Epling, his wife; and $1,375 for the surface of the property owned by Dwight Flynt and Lockie Flynt, his wife.

It is further ORDERED that all liens by taxes, judgments, deeds of trust, or otherwise, upon said property or estate or interest therein are hereby transferred to such funds; and that out of such funds the Clerk is directed to pay said liens according to their priorities; and that when all of said liens are fully released of record the Clerk shall distribute the balance of said funds, if any, among the persons entitled thereto.

It is further ORDERED that the necessary Court costs of this proceeding be taxed by the Clerk of this Court and paid by the Breaks Interstate Park Commission, said cost shall include $30.00 each to the following Commissioners:

Marcel Phillips, W. B. Trivett, O. T. Austin, Henry Sutherland, and Paris Mullins, and $5.00 each to G. C. Branham, R. F. Arrington, Paul B. Mullins, Bonsall Sykes, who were summoned and appeared, but did not serve herein.

The Court doth further ORDER the Clerk of this Court to properly record and index the papers and exhibits herein, as is by statute made and provided.

And nothing further remaining to be done in this cause the same is hereby stricken from the docket.

Enter this Order this 23 day of June, 1965.

/s/ R. J. BOYD
Judge

App. 3

SEEN:

GREEAR, BOWEN, MULLINS,
WINSTON, PIPPIN & STURGILL
The Law Building
Norton, Virginia

By /s/ LESLIE M. MULLINS
Counsel for Petitioner

SEEN & EXCEPTED TO:

/s/ S. H. SUTHERLAND
Clintwood, Virginia

/s/ A. M. PHIPPS
Clintwood, Virginia
Of Counsel for Defendants

APPENDIX B

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 24th day of November, 1965.

The petition of Crissie Kiser, James C. Kiser, John Henry Epling, Edna Epling, Dwight Flynt and Lockie Flynt for an appeal from a final order entered by the Circuit Court of Dickenson County on the 23rd day of June, 1965, in a certain proceeding then therein depending, wherein Breaks Interstate Park Commission was plaintiff and the petitioners were defendants, having been maturely considered and a transcript of the record of the order aforesaid seen and inspected, the court being of opinion that the said order is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the order of the said circuit court.

A Copy,
Testee:

/s/ H. G. TURNER
Clerk

APPENDIX C

Report of Commissioners

TO THE HONORABLE RAYMOND J. BOYD, JUDGE OF SAID COURT:

We the undersigned Commissioners, appointed by this Court on *March 10, 1965*, to fix the value of the land taken herein and the damages, if any, which may accrue to the residue beyond the enhancement in value, if any, to such residue, do hereby certify that on March *23*, 1965 we were duly sworn and went upon said land in the custody of the Sheriff of Dickenson County, Virginia, or one of his Deputies, to view the same as directed by the Order of this Court; said land being those parcels of property in Dickenson County, Virginia, described in the condemnation Petition herein filed and to which reference is hereby made.

Upon a view of the property and upon such evidence as was before us, we did fix the value of the property owned by Crissie Kiser and James C. Kiser, her husband, at *$2,700.00*.

Upon a view of the property and upon such evidence as was before us, we did fix the value of the property of John Henry Epling and Edna Epling, his wife at *$2,260.00*.

Upon a view of the property and upon such evidence as was before us, we did fix the value of the property of Dwight Flynt and Lockie Flynt, his wife, at *$1,375.00*.

Given under our hands this *24th* day of March, 1965.

Marcel Phillips
Henry B. Sutherland
O. T. Austin
W. B. Trivitt
Paris Mullins
Commissioners

NOTE: Italics in the above report handwriting. Balance in typewriter print.

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In the Supreme Court of the United States

October Term, 1965

No. 998

CRISSIE KISER, JAMES C. KISER,
JOHN HENRY EPLING, EDNA EPLING,
DWIGHT FLYNT, AND LOCKIE FLYNT,

PETITIONERS

V.

BREAKS INTERSTATE PARK COMMISSION,

DEFENDANT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR DEFENDANT IN OPPOSITION

Robert T. Winston,
Norton, Virginia

Leslie M. Mullins,
Norton, Virginia

Counsel for defendant

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In the Supreme Court of the United States

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PETITIONERS

V.

BREAKS INTERSTATE PARK COMMISSION,

DEFENDANT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Breaks Interstate Park Commission, in opposition to the Petition for a Writ of Certiorari filed herein, respectfully represents:

QUESTIONS PRESENTED

The respondent disagrees with the statement of the question presented. Respondent contends that the proper question involved was whether the procedure of the Circuit Court of Dickenson County, Virginia, which was ratified by the Supreme Court of Appeals of Virginia in refusing a Writ of Error, acted to deprieve the petitioners of their property in an eminent domain proceeding without due process of law.

STATEMENT OF THE CASE

I. Procedural History of the Case

Page references to the transcript of the trial proceedings are prefixed by the letter "T".

This proceeding arose out of a condemnation proceeding in the Circuit Court of Dickenson County, Virginia, by which Breaks Interstate Park Commission sought to condemn the surface to certain property belonging to the defendants. Breaks Interstate Park lies partially in the Commonwealth of Virginia and partially in the Commonwealth of Kentucky. The Congress of the United States, by Public Law 88-602, H. R. 11162, of September 18, 1964, authorized each Commonwealth to acquire property located within each Commonwealth by the right of eminent domain. The Legislature of the Commonwealth of Virginia by Virginia Code Section 25-232, as amended, and further statutes of Title 25 of the Code of Virginia, as amended, gave the Breaks Interstate Park Commission the right to condemn land or any interest or estate therein necessary for Breaks Interstate Park Commission to use in providing land adequate for the public purposes of the Breaks Interstate Park Commission. The Breaks Interstate Park Commission duly authorized the proceedings after attempting to negotiate with the owners as to the price thereof.

Three different parcels of land were sought to be condemned. The tract of James C. Kiser and Crissie Kiser of Grundy, Virginia, were described in Paragraph II of the Condemnation Petition, and the copy of their Deed was filed as "Exhibit A".

The second tract of land sought to be condemned was the tract of John Henry Epling and Edna Epling, his wife, which is described in Paragraph III of the Condemnation Petition and their deed was attached to the Petition as "Exhibit B".

The third tract of land sought to be condemned was the land of Dwight Flynt and Lockie Flynt, his wife, which is

described in Paragraph IV of the Petition and "Exhibit C" filed with the Petition.

A map showing a survey of the three parcels of land, the surface of which was sought to be condemned, was filed with the Petition and marked as "Exhibit D".

Due process on the petitioners was effected by personal service on the petitioners, Crissie Kiser and James C. Kiser, and by an Order of Publication as to the non-resident petitioners, John Henry Epling and Edna Epling, his wife, and Dwight Flynt and Lockie Flynt, his wife, and any unknown owners.

The petitioners all entered a general appearance by counsel and filed an Answer in the proceedings.

Petitioners' answer indicated they were not advised as to the Breaks Interstate Park Commission's authority to condemn their land and were not fully advised as to the description set out in Paragraphs II, III and IV of the Petition and called for strict proof. The petitioners further contended that the map furnished by Breaks Interstate Park Commission was not completely accurate. The petitioners then further denied that they had been offered a fair and reasonable price for the land. The petitioners' deeds filed as "Exhibits A, B, & C" with the Petition, all showed that the coal was excepted as to the three tracts of land owned by the petitioners and that it had been previously or heretofore sold and conveyed. The petitioners in their answer further said that they were the owners of the gas and oil on the lands and the Pittston Company was the owner of the coal so far as they had been advised.

The defendant, Breaks Interstate Park Commission, gave due notice to the petitioners that it was moving the Circuit Court for Dickenson County for the appointment of Commissioners. The Court entered an Order pursuant to said Notice appointing nine disinterested freeholders of Dickenson County, Virginia, to appear before the Court on March 23, 1965, at 9:30 A.M. to hear the proceeding.

The Breaks Interstate Park Commission, by its duly

constituted officers and attorneys, appeared on March 23, 1965, and all of the petitioners appeared in person or by counsel. Pursuant to the Virginia procedure, four of the Commissioners were stricken from the Commissioner list. The defendant, Breaks Interstate Park Commission, struck two of the Commissioners and the petitioners struck two of the Commissioners. The Clerk of the Court swore the Commissioners and all of the remaining five made oath before him that they would faithfully and impartially ascertain what would be the value of the land condemned. The Court then directed the remaining five Commissioners to view the land and to fix the value and interest therein to be taken. Then, the Commissioners were taken by the Sheriff to the premises for the view. They were accompanied by the Court, counsel for the petitioners and the defendant, and the parties. The Commissioners took the view and had the boundaries pointed out to them and went over the land in person. Then the parties and Commissioners returned with the Court from the view to the Courthouse and evidence was given on behalf of the Breaks Interstate Park Commission and the petitioners, which involved substantially all of the transcript of evidence filed in this case. (T. 3, Entire Transcript).

Prior to the view, counsel for the parties entered into a stipulation that the only question involved was the amount of compensation for petitioners' surface. For the record, counsel again stipulated, to save time, that the defendant had the right to bring the condemnation suit and it was just a question of how much. (T. 4). The Court directed counsel for the petitioners to supply the Minutes of the Breaks Interstate Park Commission upon request of counsel for the defendants. No request was ever made for the defendant for copies of the Minutes of the Breaks Interstate Park Commission.

After hearing evidence for the defendant, Breaks Interstate Park Commission, and for the petitioners, the Court instructed the Commissioners, **without any objections being taken by any of the parties to the instructions**, as follows:

Instruction A

The Court instructs the commissioners that it is the actual present value of the land with all its adaptations to general and special uses, and not its prospective or speculative or possible value based upon future expenditures and improvements, that is to be considered.

Instruction B

The Court instructs the Commissioners that when private property is taken under the exercise of the power of eminent domain that the law requires that just compensation be paid to the land owner. Just compensation means a fair and full equivalent for the loss sustained. It would be unjust to the Breaks Interstate Park Commission if it were required to pay more than the loss sustained by the property owners and it would be unjust to the property owners if they should receive less than their loss.

Instruction C

The Court instructs the jury that it is the duty of the Commissioner to ascertain the fair market value of the land to be taken.

The fair market value of the property is the price it will bring when offered for sale by one who desires, but is not obliged, to sell and is bought by one who desires, but is under no necessity to buy.

It is not a question of the value of the property to the Breaks Interstate Park Commission or to the owners. Nor can the value be increased or reduced by an unwillingness to sell it or because the Breaks Interstate Park Commission needs the particular property; nor because of the proposed construction by the Breaks Interstate Park Commission..

Instruction D

The Court instructs the Commissioners that it is not

necessary that all the Commissioners shall agree upon the report to be made to the Court, but a majority have the right to reach a conclusion and file their report setting forth that conclusion. If the minority desire to do so, they may file a minority report.

Instruction E

The Court instructs the Commissioners that the only issue in this case is the fair market value of the land to be taken because the Breaks Interstate Park Commission is taking the entire tract of the owners and, therefore, there is no issue in this case as far as damages to the residue is concerned.

Instruction F

The Court instructs the Commissioners that while the parties to this proceeding have the right to present evidence, oral or otherwise, and you should consider all the evidence, you are not bound by the opinion of experts or by the apparent weight of the evidence but, taking into consideration what you saw upon your view of the land, you may determine the present fair market value of the land and fix compensation and damages, if any, in the manner set forth in the other instructions of the Court.

Instruction G

The Court instructs the jury that the coal, oil and gas are not being taken and that you shall not award any amount for the same.

Instruction I

The Court instructs the Commissioners to find for the defendants Crissie Kiser, James C. Kiser, John Henry Epling and Edna Epling and Dwight Flynt and Lockie Flynt as their interests appear, respectively, such a sum as you may believe from a preponderance of the evidence is just compensation for their property being

taken, considering said property for whatever uses it may reasonably be adapted, and award compensation upon the basis of its most advantageous and valuable use as of the time of taking thereof, which is this date.

The Court then further instructed the Commissioners: "These are the Court's instructions, not given on behalf of either party. They constitute the law. As far as the evidence is concerned, you will weigh that from the witnesses you heard testify in this case and apply it to the law as contained in these instructions."

The Clerk read the instructions, closing argument was heard on behalf of the defendant and the petitioners, after which argument the Commissioners retired to the jury room and returned with their award. (T. 96) The report of the Commissioners has been printed as Appendix C to the petitioners' Petition.

The petitioners excepted to the report of the Commissioners and the Court overruled each and every exception and entered final judgment in the form of a Final Order confirming the Commissioner's Report. From the action of the Circuit Court for Dickenson County, the petitioners appealed to the Supreme Court of Appeals of Virginia for a writ of error. The Supreme Court of Appeals maturely considered the Petition for Appeal to that Court and was of the opinion that the order of the Circuit Court for Dickenson County was plainly right and refused an appeal, the effect of which was to affirm the Order of the Circuit Court of Dickenson County. The petitioners then filed a Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia in this proceeding.

II. FACTS MATERIAL TO THE CASE

In view of the extensive explanation of the material proceedings in the lower courts above stated, the facts can be stated with reasonable brevity. During the trial of the case in the lower court, Leslie M. Mullins and Glyn Phillips were counsel for Breaks Interstate Park Commission. A. M. Phipps and J. Ervin Sanders were counsel for the petition-

ers. Neither Mr. A. M. Phipps nor Mr. J. Ervin Sanders are counsel for petitioners in the appellate proceedings. Counsel for petitioners in the appellate proceeding is S. H. Sutherland of Clintwood, Virginia.

On the day of the trial, after the Commissioners were sworn, before and after the taking of the view, counsel for Breaks Interstate Park Commission and counsel for the petitioners stipulated that the only issue was the amount of damages for the taking of the surface of the petitioners. (T. 24)

A survey was made by W. R. Blair, Engineer, which was filed as "Exhibit D" with the Petition. Mr. Blair made his survey on the basis of the deeds and there was a discrepancy between the line that Mr. Blair surveyed on the map and the old fence line on the tract of James C. Kiser and Crissie Kiser. (T. 4) The discrepancy between the line in the deed as it appeared on the ground and the old fence line was pointed out to the Commissioners and the old fence line which Mr. James C. Kiser and Crissie Kiser contended was the correct line was a doubt resolved in favor of the petitioner, Crissie Kiser, and one-half of an acre was added to her acreage. (T. 4, 5, 6) With this discrepancy between the calls of the deed and the old fence line being resolved, the description and the acreage was perfectly agreeable with James C. Kiser and Crissie Kiser. (T. 94) Thus, any discrepancy in the acreage was resolved in favor of the only complaining party to the description of the property, namely, the petitioners, Crissie Kiser and James C. Kiser.

The next item to be clarified by the parties was the coal, gas and oil. Three deeds filed with the Petition as Exhibits A, B & C all showed that the coal had been sold and conveyed.

Paragraph 5 of the petitioners' answer admitted that the petitioners did not own the coal under the land and they stated that the Pittston Company was the owner of the coal so far as they were advised. The Pittston Company was not made a party defendant to the proceedings and it was not intended by the Breaks Interstate Park Commission to

take any coal belonging to the Pittston Company. Apparently, Attorney Sanders thought the petitioners owned the coal under the land and it was made perfectly plain to the parties and to the Court that the defendant was taking only the surface and not the coal, oil and gas. (T. 52, 88, 89, 90). Also, Breaks Interstate Park Commission made it perfectly clear that they were not taking the coal which did not belong to the petitioners and were not taking the gas and oil, if any existed, that did belong to the petitioners.

In order that the Commissioners would not be mislead as to what was being taken by the defendant of the petitioners, the Court instructed the Commissioners in Instruction G that the coal, oil and gas were not being taken by the Breaks Interstate Park Commission and that the Commissioners shall not award any amount for the same.

The three tracts of land that were condemned by the Breaks Interstate Park Commission was mountainous land lying close to a rugged mountainous region where the Breaks Interstate Park is being developed. The land was poor hillside land and there were no signs that it had been in cultivation for a number of years. (T. 11, 12, 16, 33, 34) There were no buildings on the property. Two of the petitioners were non-residents. They had to move out of the community like a lot of other people to find better employment. (T. 88, 96)

A greal deal was said about the trees on two tracts of the land by both witnesses for the petitioners and witnesses for the defendant. The Commissioners saw the trees. They were experienced business men. To support their findings of the value of land, there is ample evidence. W. R. Blair, Engineer, testified that he saw a few trees when he surveyed the land and walked through the woods with the Commissioners. (T. 9)

Roy Deel had been Commissioner of Revenue for Dickenson County for many years. (T. 13) Deel was also a member of the Board of Assessors to appraise all property in Dickenson County. (T.18) He put a value on the Crissie Kiser tract and the John Henry Epling tract of $60.00 an

acre as a whole. He put a value on the Lockie C. Flynt tract as a whole of $80.00 an acre. (T. 16, 17) In putting his value on the property, Roy Deel took into consideration the timber. He viewed the trees as an experienced timberman. (T. 13, 14, 15, 20) He testified that the trees were not economically feasible or profitable to log. (T. 15, 16) He also testified that there was little timber on the Lockie Flynt tract of land and that it was steep and without improvements. (T. 17)

Another witness, Bob Newberry, testified on behalf of the defendant. He was a former Treasurer of Dickenson County. He was also on the Board of Appraisers to reassess property in Dickenson County. The function of the Board was to appraise the County's real estate. Bob Newberry also was a property owner who had bought and sold property. (T. 27) He was familiar with the land sought to be condemned and said the timber had no value. (T. 27, 29)

Henry Carty, another witness, had done extensive buying of trees and timber. He testified that the trees could not be logged at a profit. (T. 33) A number of witnesses testified for the petitioners. They were either relatives or, in most instances, resided a considerable distance away from the land sought to be condemned.

After extensive testimony by both sides, instructions were offered to the Court by counsel for the petitioners and the defendant and were given by the Court **without objection.** (T. 96)

Whereupon, the Commissioners retired and returned with their report taking into consideration their own view of the premises and the evidence of witnesses.

ARGUMENT

Reasons for Refusing the Writ

All disputes as to the description of the surface sought to be condemned were resolved in favor of the petitioners in the lower court. The petitioners, James C. Kiser and Crissie C. Kiser, participated in resolving the dispute as to

the boundary line and an additional one-half acre was added to the surface sought to be taken from them. (T. 4, 5, 6)

The petitioners,, in their Petition, have quoted extensively and written voluminously about the Instructions. However, the record plainly shows that the Instructions were offered by the Court by counsel for the petitioners and the defendant, and were given by the Court **without objection.** (T. 96)

Manifestly, it would be grossly unjust to the trial court to permit the Instructions to be objected to for the first time in the appellate court where the record plainly shows there were no objections or exceptions to the Court's Instructions which could have been corrected by the trial court in the event they were erroneous. However, the Instructions are proved Instructions and trial counsel for both parties felt the Instructions were fair and just as indicated by the fact that there were no objections to the Court's Instructions.

Where the Commissioners in condemnation proceedings have been instructed, without objection from either party, as to the elements of damages to be considered by them, and they have made a report in accordance with such Instructions, the report will not be set aside. **Tidewater Railway Co. v. Cowan,** 106 Va. 817, 56 S. E. 819, 822. The Supreme Court of Virginia in that case had the following to say:

> "Whether all of the elements of damage referred to in these instructions were proper elements of damage to be considered by the Commissioners, we are not called upon to decide, and do not intend that anything said in this opinion is to be so construed, as the instructions were given without objection, and neither party can be allowed to complain that the Commissioners did what they were told it was their duty to do."

The same language of the Court is contained in 6 Mich. Jur., Va. & W. Va., Eminent Domain, Sec. 81, page 769, where the following language appears:

> "But where the commissioners in condemnation proceedings have been instructed, without objection from

either party, as to the elements of damages to be considered by them, and they have made a report in accord with such instructions, the report will not be set aside."

The defendant further argues that the Commissioners had wide discretion in determining its award based upon its own view and the evidence of witnesses.

The reasoning for the foregoing is amply stated in 6 Mich. Jur., Eminent Domain, Sec. 81, page 768, where the following appears:

"Sec. 81. Generally. - Where the proceedings are conducted according to law, and the evidence as to just compensation is in conflict, the court of appeals cannot set aside the finding of the commissioners, unless they proceeded upon erroneous principles, or unless the amount allowed is so grossly inadequate as to show prejudice or corruption on the part of the commissioners. They may base their findings largely upon facts obtained by a view of the property, which do not appear in the record. The law lays great stress upon the matter of the view, the effect of which cannot always be transmitted.

Where there is shown that numerous witnesses testify directly opposite to each other as to the value of the land, it is impossible for the court of appeals to say that the confirmation of the report by the trial court, who saw the witnesses and heard them testify, is plainly wrong or without evidence to support it."

It requires very strong evidence of inadequacy or excess in the appraised value of the land and damages to influence the court, for that cause alone, to set aside the report. 6 Mich. Jur., Eminent Domain, Sec. 82, page 770, and, further, on page 770 and 771, 6 Mich. Jur., Eminent Domain, the following appears:

"The assessment of damages will not be set aside for inadequacy of amount where the evidence is conflicting and there is nothing to show that the damages allowed, if inadequate at all, are so inadequate as to show pre-

judice or corruption. However, the courts should scrutinize carefully the reports of commissioners in eminent domain proceedings and if the damages are plainly excessive, they should reform the same.

The commissioners are not bound by the opinions of experts, or the apparent weight of the evidence, but having viewed the premises, they may give their own conclusions, and for a mere error in judgment, as to the amount of damages, there is no redress. While, if members of the commission, some of the members of the appellate court might have voted for a larger compensation, if the compensation allowed by the commissioners cannot be said to be so grossly inadequate to show prejudice or bias on their part, the award cannot be disturbed."

See also, **Va. Electric & Power Co. v. Pickett,** 197 Va. 269, 89 S.E. 2d 76.

It was stipulated that the only question involved in the proceeding in the Circuit Court of Dickenson County was the question of how much compensation should be allowed for the petitioners' surface. (T. 24) Mention was made that the records of the Breaks Interstate Park Commission as to its Minutes were in Richmond and would be furnished to counsel for petitioners upon request. No request was ever made for those minutes. Therefore, the defendant, Breaks Interstate Park Commission, takes the position that the stipulation which was made in open Court by the parties to the cause and acted upon by the Court and by the parties are binding and that a judgment founded thereon will not be reversed.

The following is found in 17 Mich. Jur., Stipulations, Sec. 1, page 371:

"Admissions and agreements made in open court by the parties to the cause and acted upon by the court are binding and a decree founded therein will not be reversed. Such admissions and stipulations, made honestly and in good faith, are everywhere encouraged by the courts, and a trial conducted on stipulations of fact is

no less a 'hearing' than is one at which the witnesses testify at length."

See, also, **United States of America v. Town of Knoxville**, 224 Fed. Rep. 2d 712.

The assignments of error brought up in the Supreme Court of Appeals for the first time and not in the lower court are not proper matters to be considered by the Supreme Court of Appeals of Virginia upon the appeal by the petitioners to that court.

It is respectfully submitted that the trial court was clearly right in overruling the petitioners' exceptions to the report of the Commissioners and in confirming the report of the Commissioners in all particulars and in entering judgment for the Breaks Interstate Park Commission in the eminent domain proceeding. It is also respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia was plainly right in rejecting the Petition for a Writ of Error to that court and in refusing said appeal to that Court, the effect of which was to affirm the order of the Circuit Court of Dickenson County, Virginia.

In view of the fact that the petitioners have substantially abandoned all of their assignments of error before the Supreme Court of Appeals of Virginia, with the exception that the property was taken without due process of law, and in view of the fact that the substantial question presented to the Supreme Court of the United States in the Petition for a Writ of Certiorari was the view of the Commissioners and the weight to be accorded to their view, it is respectfully submitted that the writ should be denied.

The proceeding in the lower court was conducted under the authority of Title 25 of the Code of Virginia, as amended.

There was no objection to the jurisdiction of the Court or to the appointment of Commissioners in the determination of preliminary issues in fixing the date of the trial on issues of just compensation as provided by Section 25-46.17 of the Code of Virginia, as amended, which reads as follows:

"Sec. 25-46.17. Determination of preliminary issues; fixing date of trial on issue of just compensation. - At the hearing upon the petition and application for the appointment of commissioners made in accordance with Sec. 25-46.9 if no answer and grounds of defense has been filed objecting to the jurisdiction if the court to hear the case and to proceed with the appointment of commissioners, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a commission or by the court, as provided in Sec. 25-46.19. If any answer and grounds of defense has been filed objecting to the jurisdiction of the court, the court shall determine such issues or other matters in controversy, excepting the issue of just compensation or matters relating to the ownership of any land or other property or the interest of any party in such land or other property, and if the court determines all such issues or other matters involving the jurisdiction of the court in favor of the petitioner, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a commission or by the court, as provided in Sec. 25-46.19.

An order of the court in favor of the petitioner on any of the foregoing preliminary issues or matters shall not be a final order for purposes of appeal but an order against the petitioner on such issues or matters shall be a final order for purposes of appeal, if the petitioner so elects. If the order against the petitioner does not dismiss the petition, the petitioner may elect to proceed with the case without waiving any of its objections and exceptions to the rulings of the court.

At such hearing the court may also determine whether the petitioner shall have the right of entry as provided in Sec. 25-46.8.

The issue of just compensation was to be determined by Sec. 25-46.19 of the Code of Virginia which provides as

follows:

> Sec. 25-46.19. How issue of just compensation to be determined. - If the statute granting the power of eminent domain does not specifically provide that a specially constituted tribunal shall determine the issue of just compensation, such issue shall be determined by a commission selected in the manner hereinafter provided in Sec. 25-46.20. By agreement of the petitioner and all the parties who are sui juris that have appeared or answered, the issue of just compensation may be determined by the court.

The parties acted upon Sec. 25-46.20 in the appointment and oath of commissioners, which provides as follows:

> Sec. 25-46.20. Appointment and oath of commissioners; commissioners to fix value of property and damages. - If the issue of just compensation is to be determined by a commission, the court shall summon nine disinterested freeholders, or five disinterested freeholders if the parties so agree, who shall be residents of the county or city wherein the property or the greater portion of the property to be condemned is situated. If nine are summoned, the petitioner and the owners shall each have two peremptory challenges and the remaining five, or the original five if only five are summoned, shall be appointed, any three or more of whom may act, and shall fix the value of property to be taken and the damages, if any, to any other property beyond the peculiar benefits, if any, to such other property by reason of the taking and use thereof by the petitioner. Before executing their duties the commissioners shall take an oath before some officer authorized by the laws of this State to administer an oath, that they will faithfully and impartially ascertain what will be the value of the property to be taken and the damages, if any, to any other property beyond the peculiar benefits, if any, to such other property, by reason of such taking and use by the petitioner.

The view of Commissioners and the hearing of testi-

mony and the Commissioners' Report and exceptions to the report and hearing thereon was conducted according to Section 25-46.21 of the Code of Virginia, which provides as follows:

> "Sec. 25-46.21. View by commissioners; hearing of testimony; commissioners' report; exceptions to report and hearing thereon. - Upon the selection of the commissioners, the court shall direct them, in the custody of the sheriff or sergeant or one of his deputies, to view the property described in the petition with the owner and the petitioner, or any representative of either party, and none other, unless otherwise directed by the court; and, upon motion of either party, the judge shall accompany the commissioners upon such view. Such view shall not be considered by the commission or the court as the sole evidence in the case. Upon completion of the view, the court shall hear the testimony in open court on the issues joined. When the commissioners shall have arrived at their conclusion they shall make their report in writing to the court, or to the judge thereof in vacation. The report may be confirmed or set aside forthwith by the court, or the judge, as the case may be, provided that when the report is so filed before the court or judge passes thereon, either party shall have the right to file written exceptions to the report, which shall be filed not later than ten days after the rendering of the report by the commissioners. The court or the judge, as the case may be, shall have the same power over the commissioners' reports as it now has over verdicts of juries in civil actions.
>
> Upon hearing of exceptions to the commissioners' report the court shall not recall and question the commissioners as to the manner in which their report was determined unless there be an allegation in such written exceptions that fraud, collusion, corruption or improper conduct entered into the report. If such allegation is made the judge shall summon the commissioners to appear and he alone shall question them concerning their actions. If the court be satisfied that

fraud, collusion, corruption, or improper conduct entered in the report of the commissioners, the report shall be set aside and new commissioners appointed to rehear the case.

If the court be satisfied that no such fraud, collusion, corruption or improper conduct entered into the report of the commissioners, or no other cause exists which justify setting asideor modifying a jury verdict in civil actions, the report shall be confirmed."

Sec. 25-232 of the Code of Virginia, as amended, enables the Breaks Interstate Park Commission to condemn land on the same basis as other governmental agencies in the Commonwealth of Virginia, including the State Highway Commission.

The foregoing sections of the Code of Virginia of 1950, as amended, have been quoted or referred to for the purpose of showing that the condemnation proceedings were conducted according to law.

The substantial question raised by the petitioners of constitutionality of the Virginia eminent domain proceedings was raised in the case of **Williamson v. Hopewell Revelopment & Housing Authority,** 203 Va. 653, 125 S. E. 2d 849. The constitutional requirements for due process of law as to notice and opportunity to be heard were discussed and the court stated as follows:

"In John Doe v. Thomas Preston Brown, 203 Va. 508, 125 S.E. 2d 159, (decided April 23, 1962) we had occasion to discuss 'due process of law' with regard to notice and an opportunity to be hear. There we said: 'It is universally recognized that 'due process of law' requires that a person be given notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree or order may be entered affecting his right to liberty or property. But this does not mean that the legislature in its discretion may not prescribe the kind of notice and the manner in which it shall be given if it is reasonable under all the circum-

stances and affords the party affected a reasonable opportunity to be heard. Violett v. City Council of Alexandria, 92 Va. 561, 567, 570, 23 S.E. 909, 912, 31 L.R.A. 382, 53 Am.St. Rep. 825; Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626, 630; 631, 635, 59 S.E. 476, 478, 480, 17 L.R.A., N.S., 324; A. S. White & Co. v. Jordan, 124 Va. 465, 466-471, 98 S.E. 24.'

In Dohany v. Rogers, 281 U.S. 362, 369, 50 S.Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434, the court stated:

'The due process clause does not guarantee to the citizen of any state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has a reasonable notice and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

There is nothing new or novel about this case. Every condemnation case is susceptible to the same contentions made by the petitioners in this case. In 18 Am. Jur., Eminent domain, Sec. 4, page 633, the following is stated:

"Accordingly, since the adoption of the Fourteenth Amendment, there is the possibility of a federal question in every taking by eminent domain under state authority, even if all of the requirements of the constitution of the state are held to have been complied with. The due process clause, in addition to its requirements of public use and just compensation, protects the land owner from the adoption of any form of procedure in eminent domain cases which deprives him of a reasonable opportunity to be heard and so to present such objections and claims as he is entitled to make."

Moreover, the use of commissioners in an eminent domain proceeding is usual and not unconstitutional as denying trial by a jury. **Charles v. Big Sandy & C R Co** 142 Va. 512, 129 S.E. 384; Fed. Rules of Civil Procedure, 71A; prac-

tice & Procedure, Barron & Holtzoff, Sec. 1525; 77 A.L.R. 2d 548; Pearson v. Yewdall, 294 U.S. 296, 24 Lawyers Ed. 436.

There is nothing novel about the Virginia procedure after the view and evidence to have Instructions by the Court and, at that time, the litigants have an opportunity to be heard upon the Instructions to be given to the Commissioners. At that time under the Virginia practice, the parties must state their objectons to the Court as to Instructions offered by the condemnor and offer their own Instructions and object to the action of the Court in refusing the same. In addition, an exception must be made to the Court which, in essence, tells the Court of the Parties intent to appeal to the appellate court. There is nothing unusual about such procedure. See **Tiller v. N & W Railway Co.**, 201 Va 222, 110 S. E. 2d 209; **State Highway Commissioner of Va. v. Skillman,** 206 Va. 39, 141 S. E. 2d 700; **6 Mich. Jur.**, Va. & W. Va. Eminent Domain, Sec. 81, page 769; 53 **Am. Jur. Trial**, Sec. 826, 827, page 606, 607.

In **2,872.88 Acres of Land v. United States,** 376 U. S. 192, 11 L. Ed. 2, 629, 84 Supreme Court, 639, rehearing denied, 376 U. S. 937 12 L. Ed. 2, 87, 84 Supreme Court 1131, the Supreme Court of Appeals, through Justice Douglas, said:

> "Moreover, the litigants have a responsibility to assist the process by specifying their objections to instructions, by offering alternate ones, and by making their timely objections to the report in specific rather than in generalized form, as required by equity practice."

It is respectfully submitted that the petitioners offered no objections to the instructions. Petitioners are attempting to evoke federal jurisdiction for the first time in their Motion to Set Aside the Commissioner's Report and relying upon **Chicago, Burlington & Quincy R. Co. v. City of Chicago,** 226-263. In that case there was no procedure permitting an answer by the land owner, whereas in the case at bar the Virginia statute permitted an answer and the petitioners, in fact, did file an answer.

The petitioners contend that the award lacked due process because it was based upon the sole view of the Commissioners. Such is not the facts in this case. The Commissioners had a view of the premises and heard the evidence of many witnesses prior to rendering their report. Their report which is filed as Appendix C to the Petitioners' Petition states that the value of the parcels taken were founded upon two things. First, a view of the property and, second, upon such evidence as was before them.

It is respectfully submitted that the trial court should not have set aside the Commissioner's Report. In 6 Mich. Jur., Va. & W. Va., Eminent Domain, Sec. 81, it is provided at page 768:

> Sec. 81. Generally - Where the proceedings are conducted according to law, and the evidence as to just compensation is in conflict, the court of appeals cannot set aside the finding of the commissioners, unless they proceeded upon erroneous principles, or unless the amount allowed is so grossly inadequate as to show prejudice or corruption on the part of the commissioners. They may base their findings largely upon facts obtained by a view of the property, which do not appear in the record. The law lays great stress upon the matter of the view, the effect of which cannot always be transmitted.
>
> Where it is shown that numerous witnesses testify directly opposite to each other as to the value of the land, it is impossible for the court of appeals to say that the confirmation of the report by the trial court, who saw the witnesses and heard them testify, is plainly wrong or without evidence to support it."

In condemnation proceedings, great weight is given to the view of the premises by commissioners or a jury. **U. S. v. Wise,** 131 Fed. 2d, 851.

In conclusion, it is respectfully submitted that under the foregoing law that the petitioners' property has been taken by the defendant under due process of law. There was

service of process upon the petitioners. Petitioners filed an answer by counsel of their own choosing. Petitioners were given notice of an application being made to the court for the appointment of commissioners. Petitioners exercised their statutory rights of helping select the commissioners by taking two strikes in the elimination of the commissioners from nine to five. The petitioners, by counsel and in person, participated in the view of the land sought to be condemned. All the evidence presented in the case was heard in open court by the petitioners. The petitioners exercised the right of cross examination of witnesses for the defendant. The petitioners presented witnesses in their behalf as to the valuation of the land sought to be condemned. The petitioners, by counsel, participated in formulating the instructions be given by the court to the Commissioners without objection. Petitioners' counsel participated in the closing argument to the Commissioners. Petitioners, by counsel, made a motion to set aside the award and argued the same before the lower court. Petitioners, by counsel, filed a Petition for a writ of Error in the Supreme Court of Appeals of Virginia, which held that there was no error in the proceedings in the Circuit Court for Dickenson County.

CONCLUSION

For the reasons set forth above, the defendant prays that a Writ of Certiorari be denied by Your Honors.

And your defendant will ever pray, etc.

Respectfully submitted,

Robert T. Winston,
Norton, Virginia

Leslie M. Mullins,
Norton, Virginia

Counsel for defendant

APPENDIX

APPENDIX A

APPENDIX OF EXCERPTS FROM TESTIMONY

(The Commissioners were sworn; the reporter was sworn; the Court, counsel and Commissioners took a view of the property under consideration in the case.) (T. 3)

MR. MULLINS: Your Honor, just to save time, we do not have in the record but I think we agreed this morning the Breaks Park Commission had the right to bring this condemnation suit. We agreed to stipulate that and it is just a question of how much.

MR. PHIPPS: All right.

THE COURT: Is that you gentlemen's understanding?

MR. PHIPPS: I said it was agreeable. (T. 24)

(In chambers, instructions were offered to the Court by counsel for the Petitioner and the defendants, and were given by the Court without objection.)

THE COURT: Gentlemen of the Commission, I am going to ask the Clerk to read the instructions. I can read them but I am not taking any chances. I will ask him to read the instructions. These are the Court's instructions, not given on behalf of either party. They constitute the law. As far as the evidence is concerned, you will weigh that from the witnesses you heard testify in this case and apply it to the law as contained in these instructions.

(The Clerk read the instructions; closing argument was heard on behalf of the Petitioner and the defendants, after which argument the Commissioners retired to the jury room and returned with their award in these actions.) (Counsel for defendants were given ten days in which to file exceptions to the report of the Commissioners. Court was adjourned.) (T. 96, 97)

Service of the within Brief of the Defendant, in triplicate, with Appendix attached, in opposition to a Writ of Certiorari to the Supreme Court of Appeals of Virginia is hereby accepted this March 2nd, 1966.

s/ S. H. Sutherland
Counsel for Petitioners

Service of the foregoing Brief, in triplicate, with Appendix attached, in opposition to the granting of a Writ of Certiorari to the Supreme Court of Appeals of Virginia was made by an acknowledgment of the same signed by Counsel of record for the petitioners, pursuant to Rule 33 (3)(a) of the Rules of the Supreme Court of the United States.

Robert T. Hunter

[redacted]
Counsel for Defendants